



# **Policy Monitoring Review of Kendall County's Indigent Defense Systems**

**December 2018**



209 W. 14th Street, Room 202 (Price Daniel Building)  
Austin, Texas 78701  
Phone: 512.936.6994; Fax: 512.463.5724  
[www.tidc.texas.gov](http://www.tidc.texas.gov)

**Chair:**

Honorable Sharon Keller Presiding Judge, Court of Criminal Appeals

**Ex Officio Members:**

Honorable Sharon Keller Austin, Presiding Judge, Court of Criminal Appeals  
Honorable Nathan L. Hecht Austin, Chief Justice, Supreme Court of Texas  
Honorable John Whitmire Houston, State Senator  
Honorable Brandon Creighton Conroe, State Senator  
Honorable Joseph "Joe" Moody El Paso, State Representative  
Honorable Andrew Murr Junction, State Representative  
Honorable Sherry Radack Houston, Chief Justice, First Court of Appeals  
Honorable Vivian Torres Rio Medina, Medina Statutory County Judge

**Members Appointed by the Governor:**

Mr. Alex Bunin Houston, Chief Public Defender, Harris County  
Public Defender Office  
Honorable Jon Burrows Temple, Bell County Judge  
Honorable Richard Evans Bandera, Bandera County Judge  
Mr. Don Hase Arlington, Attorney, Ball & Hase  
Honorable Missy Medary Corpus Christi, Presiding Judge, 5th Administrative  
Judicial Region of Texas

**Staff:**

Geoff Burkhart Executive Director  
Wesley Shackelford Deputy Director  
Claire Buetow Policy Analyst  
Edwin Colfax Grant Program Manager  
Scott Ehlers Special Counsel  
Marissa Kubinski Executive Assistant  
Joel Lieurance Senior Policy Monitor  
Morgan Shell Policy Analyst  
Debra Stewart Fiscal Monitor  
Doriana Torres Grant Specialist  
Sharon Whitfield Budget & Accounting Analyst

**MISSION**

The Texas Indigent Defense Commission provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law.

## Contents

|  |    |
|--|----|
| Purpose of the Policy Monitoring Review .....  | 4  |
| Program Assessment .....   | 5  |
| Requirement 1: Conduct Prompt and Accurate Article 15.17 Proceedings .....                               | 5  |
| Requirement 2: Determine indigence according to standards directed by the<br>indigent defense plan. .... | 8  |
| Requirement 3: Establish minimum attorney qualifications. ....   | 9  |
| Requirement 4: Appoint counsel promptly.....   | 10 |
| Requirement 5: Institute a fair, neutral, and nondiscriminatory attorney selection<br>process.....       | 14 |
| Conclusion .....   | 15 |
| Summary of Findings and Recommendations .....  | 16 |
| Appendix - Monitoring Review Checklist .....   | 17 |

## **Purpose of the Policy Monitoring Review**

The Texas Indigent Defense Commission (TIDC) monitors local jurisdictions' compliance with the Fair Defense Act (FDA) through on-site reviews.<sup>1</sup> These reviews seek to promote local compliance and accountability with the requirements of the FDA and to provide technical assistance to improve county indigent defense processes where needed. Additionally, the review process aims to assist local jurisdictions in developing procedures to monitor their own compliance with their indigent defense plans and the FDA.

## **Overview**

The FDA provides a statutory framework for the appointment of counsel and mandates specific timeframes for taking, transmitting, and ruling upon requests for counsel. Jurisdictions retain latitude to develop the standard by which they determine indigence and their procedures for appointing counsel. In odd-numbered years, counties are responsible for submitting to TIDC their local formal and informal rules related to the appointment of counsel.<sup>2</sup> This review assesses whether Kendall County's local practices and procedures meet the FDA requirements and TIDC's administrative rules. TIDC staff compared the FDA's core requirements to the County's practices in the following five areas:<sup>3</sup>

- 1: Conduct prompt and accurate Article 15.17 proceedings.
- 2: Determine indigence according to standards directed by the indigent defense plan.
- 3: Establish minimum attorney qualifications.
- 4: Appoint counsel promptly.
- 5: Institute a fair, neutral, and nondiscriminatory attorney selection process.

TIDC staff, Morgan Shell, Claire Buetow, and Joel Lieurance, conducted an on-site review from June 19 – 22, 2018. The primary source of information for this report came from sample felony, misdemeanor and juvenile cases filed during FY2017 (October 2016 – September 2017).<sup>4</sup> Staff also observed a misdemeanor docket and magistrate warnings. Other useful information included the Indigent Defense Expense Report, local indigent defense plans, monthly reports submitted to the Office of Court Administration (OCA), and data maintained by other county personnel (including attorney appointment lists and proof of eligibility for those lists). The report follows with accompanying findings and recommendations.

---

<sup>1</sup> TEX. GOV'T CODE § 79.037(a)–(b).

<sup>2</sup> TEX. GOV'T CODE § 79.036(a)(1).

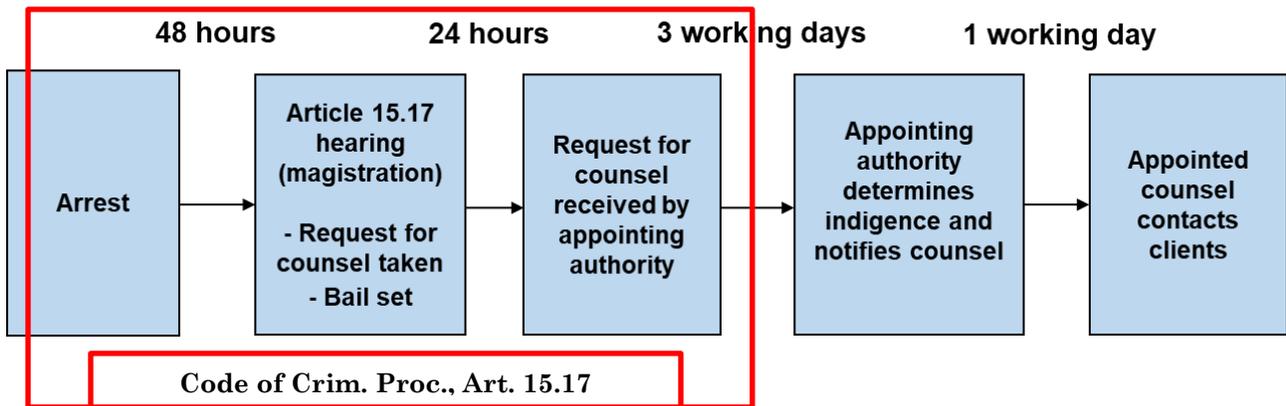
<sup>3</sup> The fiscal monitor issued a report covering indigent payment processes and statutory data reporting, the sixth core requirement of the FDA.

<sup>4</sup> TIDC staff systemically selected 71 felony case files and 76 misdemeanor case files. Staff sequentially selected 13 juvenile case files.

## Program Assessment

### **REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS**

Once arrested, an accused must be brought before a magistrate within 48 hours.<sup>5</sup> At this hearing, the magistrate must inform the accused of his or her right to counsel, inform the accused of the procedures for requesting counsel, and ensure that the accused has reasonable assistance in completing the necessary forms for requesting assistance of counsel.<sup>6</sup> Finally, within 24 hours of receiving a request for counsel, the magistrate must transmit this request to the entity authorized to appoint counsel.<sup>7</sup>



#### ***Kendall County's Article 15.17 Procedures***

Following arrest, officers bring arrestees to the Kendall County Jail for booking and processing. On each day of the week, a magistrate determines probable cause, sets bail, and informs arrestees of their rights. Magistrate duties rotate among the County's four justices of the peace.

TIDC staff observed Article 15.17 hearings at the Kendall County Jail on June 21, over which the justice of the peace for Precinct 2 presided. The judge gave the required admonishments, made probable cause determinations, set bail, and asked each arrestee whether he or she: needed a court-appointed attorney; wished to hire his or her own attorney; or represent himself or herself. Five arrestees at the hearing were charged with felony offenses, and three with misdemeanor offenses. None of the eight arrestees requested counsel; all stated they wished to retain counsel.

#### ***1.a. Timeliness of Warnings***

The accused must be brought before a magistrate within 48 hours of arrest.<sup>8</sup> TIDC presumes that a county is in substantial compliance with the prompt magistration

<sup>5</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>6</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>7</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>8</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

requirement if at least 98% of Article 15.17 hearings are conducted within 48 hours.<sup>9</sup> To determine the timeliness of Article 15.17 warnings in Kendall County, TIDC staff sampled 141 cases and calculated the number of days between arrest and the Article 15.17 hearing for each case.<sup>10</sup> The Article 15.17 hearings for all 141 sample cases occurred within two days of arrest, indicating that Kendall County is in substantial compliance with this requirement.

**Table 1: Timeliness of Article 15.17 Hearings**

|   | Sample Size | Percent     |
|---|-------------|-------------|
| Article 15.17 hearing occurs x days after arrest: | —           | —           |
| 0 days  | 44          | 31.2%       |
| 1 day   | 97          | 68.8%       |
| 2 days  | 0           | 0%          |
| More than 2 days                                  | 0           | 0%          |
| <b>Timely Hearings</b>                            | <b>141</b>  | <b>100%</b> |

***1.b. Ability of Arrestees to Request Counsel***

At the Article 15.17 hearing, the magistrate must inform the accused of his or her right to counsel, ask whether the accused wants to request counsel, and receive the accused’s request for counsel.<sup>11</sup> The magistrate must make a record of each step of this exchange.<sup>12</sup> TIDC uses these records to determine if arrestees are informed of their right to counsel and invoke that right.<sup>13</sup> See Table 2 below.

**Table 2: Judicial Council Monthly Activity Reports (Oct. 2016 – Sept. 2017)**

| <b>Article 15.17 Warnings and Requests for Counsel Reported by Magistrates</b> | JP1 | JP2 | JP3 | JP4 |
|--|-----|-----|-----|-----|
| Misdemeanor Counsel Requests   | 23  | 31  | 18  | 19  |
| Misdemeanor Warnings (A & B)   | 298 | 319 | 315 | 271 |
| % Misdemeanor Requests   | 8%  | 10% | 6%  | 7%  |
| Felony Counsel Requests  | 31  | 22  | 14  | 8   |
| Felony Warnings  | 155 | 152 | 140 | 152 |
| % Felony Requests  | 20% | 15% | 10% | 5%  |

<sup>9</sup> 1 TEX. ADMIN. CODE § 174.28.

<sup>10</sup> The 141 cases were felony and misdemeanor cases in which staff could determine the time from arrest until the Article 15.17 hearing.

<sup>11</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>12</sup> TEX. CODE CRIM. PROC. art. 15.17(e).

<sup>13</sup> TIDC received these records from the Office of Court Administration, where the judges submit them each month.

TIDC staff examined a few Spanish language magistrate warning forms during the case file review. These forms did not contain a place to mark whether the arrestee requested counsel. Article 15.17(e) of the Code of Criminal Procedure states:

- (e) In each case in which a person arrested is taken before a magistrate as required by Subsection (a) or Article 15.18(a), a record shall be made of:*
  - (1) the magistrate informing the person of the person's right to request appointment of counsel;*
  - (2) the magistrate asking the person whether the person wants to request appointment of counsel; and*
  - (3) whether the person requested appointment of counsel.*

All forms adopted by Kendall County must allow the magistrate to follow the requirement to record whether the arrestee wants to request appointed counsel.

### ***1.c. Reasonable Assistance in Completing Forms for Requesting Counsel***

At the Article 15.17 hearing, magistrates must ensure that the accused has reasonable assistance in completing the necessary forms for requesting counsel.<sup>14</sup> Staff observed multiple case files in which arrestees requested counsel at the Article 15.17 hearing, but the form stated, “will do paperwork later.” Kendall County must put in place a system in which financial paperwork is completed contemporaneously with the hearing.

### ***1.d. Transmitting Forms to the Appointing Authority***

Within 24 hours of a defendant requesting counsel, the magistrate must transmit this request to the entity authorized to appoint counsel.<sup>15</sup> During staff’s viewing of the Article 15.17 hearing, the magistrate stated that when he receives a request for counsel, he immediately walks the paperwork to the court. Based on TIDC’s case file review, several requests for counsel did not appear to be transmitted to the appointing authority within 24 hours of the request being made (evidenced by a mark noting the arrestee would complete the paperwork later).

---

<sup>14</sup> TEX. CODE CRIM. PROC. art. 15.17(a) states: ... *The magistrate shall ensure that reasonable assistance in completing the necessary forms for requesting appointment of counsel is provided to the person at the same time. ...*

<sup>15</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

## FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

### **Conduct prompt and accurate magistration proceedings.**

**FINDING 1:** Article 15.17(e) requires the magistrate to mark whether an arrestee requests the appointment of counsel. The Spanish language magistrate warning form does not contain a space to mark whether the arrestee requested counsel. Kendall County must ensure that all magistrate forms allow for counsel requests to be recorded.

**FINDING 2:** Article 15.17(a) requires reasonable assistance in completing financial paperwork be provided to persons requesting counsel at the time of the 15.17 hearing. Kendall County must put in place a system in which all persons requesting counsel receive contemporaneous assistance in completing financial affidavits. Once financial paperwork is completed, it must be transmitted to the appointing authority within 24 hours of the request being made.

## **REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN.**

Under Article 26.04(l) of the Code of Criminal Procedure, counties must adopt procedures and financial standards for determining whether a defendant is indigent. Article 26.04(m) lists the factors courts may consider in determining indigence. Article 26.04(m) states:

*In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.*

The local standards for determining indigence are set in each county's indigent defense plans.<sup>16</sup> For adult felony and misdemeanor cases in Kendall County, a person is presumed indigent if:

- (1) The accused is eligible for food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing;
- (2) The accused's net household income does not exceed 125% of the Poverty Guidelines as revised annually by the United States Department of Health and Human Services and published in the Federal Register; or

---

<sup>16</sup> Kendall County has two indigent defense plans:

- an adult plan (<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=627>); and
- a juvenile board plan (<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=626>).

- (3) The accused is currently serving a sentence in a correctional institution, is residing in a public mental health facility, or is subject to a proceeding in which admission or commitment to such mental health facility is sought.

For juveniles, the same financial standards used in adult cases apply, except indigence is based upon the person responsible for the support of the child.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2**

**Determination of Indigence.**

Requirement satisfied. No findings.

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.**

The Kendall County Adult Indigent Defense Plan creates the following attorney appointment lists: capital cases; first and second degree felony cases; third degree and state jail felony cases, appeals cases; and misdemeanor cases. The juvenile plan creates three separate lists for the following disposition possibilities: (1) CINS charges or delinquent conduct, and commitment to TJJD is not an authorized disposition; (2) delinquent conduct, and commitment to TJJD without a determinate sentence is an authorized disposition; and (3) determinate sentence proceedings have been initiated or proceedings for discretionary transfer to criminal court have been initiated.

Attorneys on the adult appointment lists must obtain a minimum of six hours of continuing legal education (CLE) training in criminal law, while attorneys on the juvenile appointment list must obtain a minimum of six hours of CLE training in juvenile law. TIDC found the County has procedures for managing the attorney appointment lists, but does not track whether attorneys meet their annual CLE requirement as described in the indigent defense plans. Kendall County must put in place a procedure to ensure attorneys on the appointment lists meet their required criminal and juvenile CLE requirements. Local officials stated they would track this information in the future.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 3**

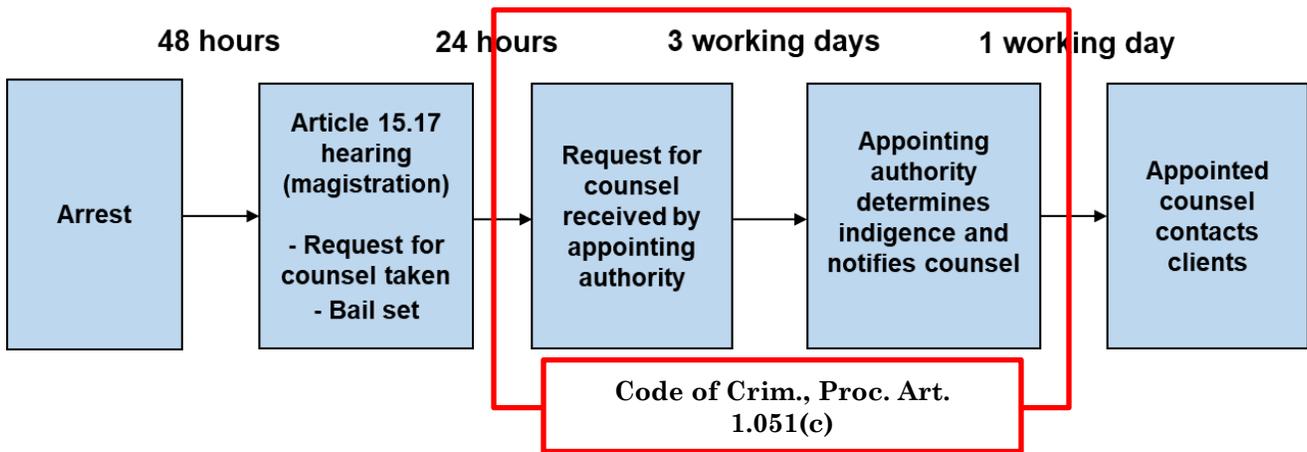
**Establish Minimum Attorney Qualifications.**

**FINDING 3:** The local indigent defense plans require attorneys on appointment lists to annually obtain six criminal / juvenile CLE hours. Kendall County must put in place a system to track whether attorneys meet this condition for remaining on the appointment list.

## REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

Article 1.051(c) of the Code of Criminal Procedure requires the court or its designee to appoint counsel by the end of the third working day following receipt of the request for counsel made at the Article 15.17 hearing.<sup>17</sup> To assess the timeliness of Kendall County’s appointment procedures in felony and misdemeanor cases, TIDC staff attempted to examine the time from request for counsel to appointment or denial of indigence. Under TIDC’s administrative rules, a county is presumed in compliance with the prompt appointment of counsel requirement if at least 90% of sample indigence determinations are timely.<sup>18</sup>

**Figure 1: Timeline for Appointment of Counsel in Adult Criminal Cases**



### *Timeliness of Appointments in Felony Cases*

To assess the timeliness of Kendall County’s current appointment procedures in felony cases, TIDC staff examined 71 sample felony cases filed in FY17 (October 2016 – September 2017). Counsel was appointed in a timely manner in 38 of 49 sample cases containing a request for counsel (**78% timely**), which does not meet TIDC’s 90% timeliness threshold. Several late appointments were those in which defendants requested counsel at the Article 15.17 hearing, but the magistrate noted the defendant would complete the paperwork at a later time. Kendall County must put in place procedures to ensure timely determinations of indigence in felony cases. A prime way this could be done would be to ensure all defendants who request counsel have their financial paperwork promptly completed and transmitted to the appointing authority. Table 3 summarizes the timeliness of counsel appointments in felony cases.

<sup>17</sup> *Rothgery v. Gillespie County* clarified that the initiation of adversarial judicial proceedings occurs at the Article 15.17 hearing. 554 U.S. at 212 – 13.

<sup>18</sup> 1 TEX. ADMIN. CODE § 174.28.

**Table 3: Times from Request to Appointment in Felony Cases**

|   | Sample Size | Number from sample | Percent    |
|---|-------------|--------------------|------------|
| Number of case files examined                         | 71          |                    |            |
| Total cases with a counsel request <sup>19</sup>      |             | 49                 |            |
| <b>Appointment / denial of indigence occurred in:</b> |             |                    |            |
| 0 work days   |             | 27                 |            |
| 1 – 3 work days + 24 hour transfer                    |             | 11                 |            |
| <b>Total timely appointments / denials</b>            |             | <b>38</b>          | <b>78%</b> |
| 4 to 10 work days + 24 hour transfer                  |             | 5                  |            |
| More than 10 work days + 24 hour transfer             |             | 4                  |            |
| No ruling on request                                  |             | 2                  |            |
| Total untimely appointments / denials                 |             | 11                 | 22%        |

***Timeliness of Appointments in Misdemeanor Cases***

To assess the timeliness of Kendall County’s current appointment procedures in misdemeanor cases, TIDC staff examined 76 sample misdemeanor cases filed in FY17 (October 2016 – September 2017) and observed a misdemeanor arraignment docket on June 20, 2018.

The misdemeanor arraignment docket is the first appearance for defendants after a case has been filed with the Kendall County Clerk’s Office. In Kendall County, multiple attorneys are assigned to the misdemeanor arraignment docket. Each attorney is paid \$500 for all appointments received at the docket, and each attorney receives multiple appointments. Attorneys who receive appointments at this docket represent clients through case disposition. If an individual case takes an extra amount of effort, the judge will pay an hourly rate for the case.

Prior to the docket, some defendants met with attorneys they had retained. The judge began the docket by calling role. The judge then explained that for defendants without counsel, attorneys would divide the cases between themselves. The attorneys met with each of their newly assigned clients and began negotiating with the prosecutor. Staff observed 15 pleas taken and several dismissals. Most pleas were for time served.

TIDC could not assess the timeliness of misdemeanor appointments because formal orders appointing counsel or denying indigence are not typically made. Instead, attorney appointments are made in an informal manner. Kendall County must introduce procedures to document appointments of counsel and denials of indigence in misdemeanor cases.

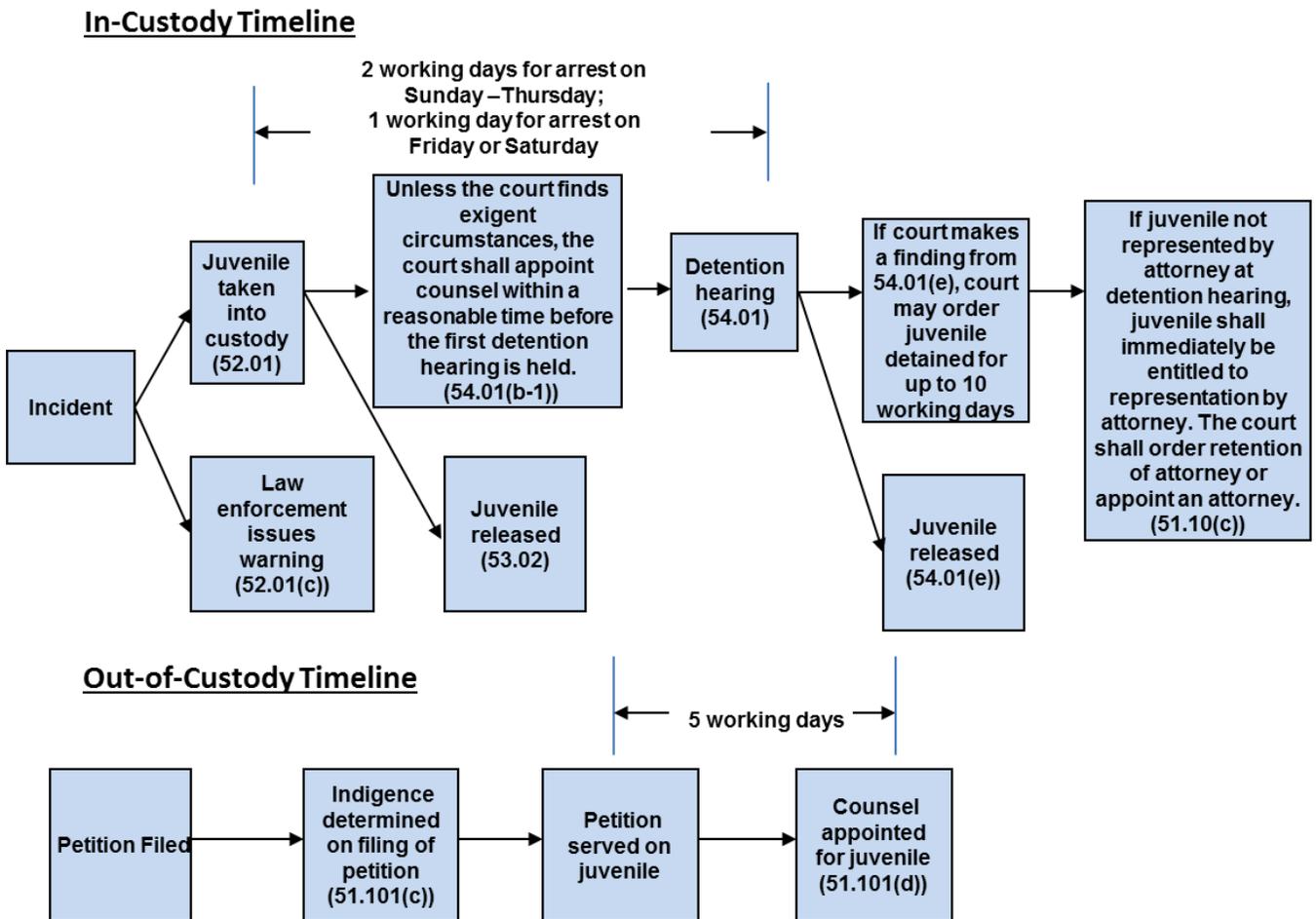
---

<sup>19</sup> Four additional cases included an appointment of counsel, but staff could not determine the timeliness of these appointments. These cases were excluded from the sample.

## Timeliness of Appointments in Juvenile Cases

Counsel must be appointed for juveniles charged with delinquent conduct when the juvenile is brought to a detention hearing and when the juvenile is served with a copy of the petition alleging misconduct. Under Section 54.01(b-1) of the Family Code, unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing. Under Subsections 51.101(c) and (d) of the Family Code, once a petition is served on the juvenile, the court has five working days to appoint counsel or order the retention of counsel for the juvenile. To assess the timeliness of Kendall County’s appointment procedures in juvenile cases, TIDC staff examined 13 cases filed in FY17 (October 2016 – September 2017).

**Figure 2: Timeline for Appointment of Counsel in Juvenile Cases**



### ***Juvenile Detention Hearings***

Section 54.01(b-1) of the Family Code requires counsel be appointed prior to the detention hearing unless appointment is not feasible due to exigent circumstances.<sup>20</sup> Of 13 sample juvenile cases, six involved detention hearings. Counsel was present for the initial detention hearing in four of those six cases (**67% timely**). This falls below TIDC’s 90% threshold for timeliness, indicating that Kendall County is not in substantial compliance with this requirement. The two cases without an attorney present at the hearing had counsel appointed on the same day as the hearing, but no exigent circumstances were listed on the juvenile detention form. Kendall County must ensure the presence of counsel at the initial detention hearing unless it can document exigent circumstances.

### ***Appointment After Service of the Petition***

In cases involving the service of a petition on a juvenile, counsel was present in a timely fashion for **64%** of the sample. This falls below TIDC’s 90% threshold for timeliness, indicating that the County is not in substantial compliance with this requirement. The late appointments may be due to the court not making contact with parents prior to the expiration of the five-working-day requirement set in Section 51.101(d). To address the issue, the County should ensure that juvenile probation promptly conducts financial intakes and transmits those affidavits to the appointing authority. This could be done at juvenile court intake or upon filing or service of the petition.

**Table 4: Times to Appointment in Juvenile Cases**

|   | Sample Size | Number from Sample | Percent    |
|---|-------------|--------------------|------------|
| Total juvenile cases examined   | 13          |                    |            |
| <b>TIMELINESS OF COUNSEL APPOINTMENTS FOR DETENTION HEARINGS</b>                |             |                    |            |
| Case files with detention hearings  | 6           |                    |            |
| <b>Cases with attorney present at initial hearing</b>                           |             | <b>4</b>           | <b>67%</b> |
| <b>TIMELINESS OF COUNSEL APPOINTMENTS WHERE JUVENILE SERVED WITH A PETITION</b> |             |                    |            |
| Case files in which juvenile served with a petition                             | 11          |                    |            |
| Counsel appointed within 5 working days of service                              |             | 7                  |            |
| Counsel retained within 5 working days of service                               |             | 0                  |            |
| Indigence denied within 5 working days of service <sup>21</sup>                 |             | 0                  |            |
| <b>Total cases with timely presence of counsel</b>                              |             | <b>7</b>           | <b>64%</b> |
| Total cases with untimely presence of counsel                                   |             | 4                  | 36%        |

<sup>20</sup> Tex. Fam. Code §54.01(b-1) states:

*Unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.*

<sup>21</sup> Staff considered a denial of indigence to be synonymous with an order to retain counsel.

## FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

### **Appoint Counsel Promptly.**

**FINDING 4 (felony cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The felony case sample fell below TIDC's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline in felony cases.

**FINDING 5 (misdemeanor cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. Kendall County does not typically issue formal orders appointing counsel or denying indigence in misdemeanor cases. The County must introduce procedures to document appointments of counsel in misdemeanor cases.

**FINDING 6 (juvenile cases):** The sample of attorney appointments where a juvenile remained in custody and received a detention hearing fell below TIDC's 90% timeliness threshold. The County must implement practices to ensure counsel is appointed within a reasonable time before the first detention hearing as required by Section 54.01(b-1) of the Family Code.

**FINDING 7 (juvenile cases):** The timeliness of counsel appointments in cases involving service of a petition fell below TIDC's threshold of 90% timeliness. The County must implement practices that satisfy the time frames set in Section 51.101 of the Family Code (appointment of counsel or order to employ counsel occurring within five working days of petition service).

## **REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS.**

Article 26.04(b)(6) of the Code of Criminal Procedure requires courts to adopt procedures ensuring appointments are allocated among qualified attorneys in a manner that is fair, neutral, and nondiscriminatory. TIDC presumes that a jurisdiction has a fair, neutral, and nondiscriminatory appointment system if the top 10% of attorneys receiving cases at a given level (felony, misdemeanor, and juvenile) receive no more than three times their respective share of appointments.<sup>22</sup> A county can overcome the presumption by providing evidence as to why the system is fair, neutral, and nondiscriminatory.

---

<sup>22</sup> "The top 10% of recipient attorneys is the whole attorney portion of the appointment list that is closest to 10% of the total list." 1 Tex. Admin Code § 174.28(c)(5). The target "respective share" of cases for the Top 10% of attorneys therefore may be more or less than 10%, and three times that share maybe more or less than 30%.

Kendall County uses an alternative system of appointment for all levels of cases. Under an alternative appointment system, the court may independently determine how appointments are made, so long as they are reasonably and impartially allocated among qualified attorneys.

TIDC staff analyzed the distribution of cases paid to attorneys during FY2017. If the jurisdiction can track when attorneys enter and leave the appointment list, TIDC only considers those attorneys who were on the appointment list for the entire year. Staff made no analysis of appointments in misdemeanor cases because the reported case counts were not accurate. Based on this analysis, both felony cases and juvenile cases had distributions in which the top ten percent of attorneys received less than 3.0 times their respective share of cases paid, indicating that these court levels comply with this requirement.

**Table 5: Share of Cases Paid to Top 10% of Attorneys**

| Level    | Attorneys on List | Top 10% Attorneys <sup>23</sup> | Respective Share of Cases <sup>24</sup> [Column A] | Actual Share of Cases [Column B] | Top 10% Received 'x' Times Their Respective Share [Col. B] / [Col. A] |
|----------|-------------------|---------------------------------|--|----------------------------------|---|
| Felony   | 25                | 3                               | 12.0%  | 35.7%                            | <b>2.97</b>   |
| Juvenile | 4                 | 1                               | 25.0%  | 35.3%                            | <b>1.41</b>   |

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 5**

**Attorney Selection Process**

Requirement satisfied. No findings.

**Conclusion**

TIDC appreciated the professionalism and assistance provided by Kendall County officials and staff. Kendall County officials appear willing to make necessary changes to improve the indigent defense system. As mandated by statute, TIDC will continue to review the County’s transition and adjustments to the report’s findings. TIDC staff is available to assist Kendall County officials meet their statutory and constitutional obligations in regard to providing counsel to indigent defendants, either through technical assistance or potential grant funding. Please contact Joel Lieurance, Senior Policy Monitor, to discuss how we may be of assistance.

<sup>23</sup> The number Top 10% Attorneys is equal to the number of Attorneys on List for Entire Year multiplied by 0.10, rounded to the nearest whole number.

<sup>24</sup> The percent Respective Share of Cases is equal to the number of Top 10% Attorneys divided by the number of Attorneys on List for Entire Year.

## **Summary of Findings and Recommendations**

Kendall County must respond in writing how it will address each of these recommendations.

**FINDING 1 AND RECOMMENDATION:** Article 15.17(e) requires the magistrate to mark whether an arrestee requests the appointment of counsel. The Spanish language magistrate warning form does not contain a space to mark whether the arrestee requested counsel. Kendall County must ensure that all magistrate forms allow for counsel requests to be recorded.

**FINDING 2 AND RECOMMENDATION:** Article 15.17(a) requires reasonable assistance in completing financial paperwork be provided to persons requesting counsel at the time of the 15.17 hearing. Kendall County must put in place a system in which all persons requesting counsel receive contemporaneous assistance in completing financial affidavits. Once financial paperwork is completed, it must be transmitted to the appointing authority within 24 hours of the request being made.

**FINDING 3 AND RECOMMENDATION:** The local indigent defense plans require attorneys on appointment lists to annually obtain six criminal / juvenile CLE hours. Kendall County must put in place a system to track whether attorneys meet this condition for remaining on the appointment list.

**FINDING 4 AND RECOMMENDATION (felony cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The felony case sample fell below TIDC's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline in felony cases.

**FINDING 5 AND RECOMMENDATION (misdemeanor cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. Kendall County does not typically issue formal orders appointing counsel or denying indigence in misdemeanor cases. The County must introduce procedures to document appointments of counsel in misdemeanor cases.

**FINDING 6 AND RECOMMENDATION (juvenile cases):** The sample of attorney appointments where a juvenile remained in custody and received a detention hearing fell below TIDC's 90% timeliness threshold. The County must implement practices to ensure that counsel is appointed within a reasonable time before the first detention hearing as required by Section 54.01(b-1) of the Family Code.

**FINDING 7 AND RECOMMENDATION (juvenile cases):** The timeliness of counsel appointments in cases involving service of a petition fell below TIDC's threshold of 90% timeliness. The County must implement practices that satisfy the time frames set in Section 51.101 of the Family Code (appointment of counsel or order to employ counsel occurring within five working days of petition service).

## Appendix - Monitoring Review Checklist

The monitoring review of the FDA's core requirements consisted of an examination of the items from the following checklist. If a box is marked, the specific requirement was met. If a box is not marked, the requirement either was not satisfied or is not applicable.

### REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

- The accused must be brought before a magistrate within 48 hours of arrest.<sup>25</sup>
  - A person arrested for a misdemeanor without a warrant must be released on bond in an amount no more than \$5,000 not later than 24 hours after arrest if a magistrate has not determined probable cause by that time.<sup>26</sup>
- The magistrate must inform and explain the right to counsel and the right to appointed counsel to the accused.<sup>27</sup>
- The magistrate must ensure that reasonable assistance in completing forms necessary to request counsel is provided to the accused.<sup>28</sup>

**REQUIREMENT NOT SATISFIED:** TIDC staff found some instances in which financial paperwork was not promptly completed.

- A record must be made of the following:
  - the magistrate informing the accused of the accused's right to request appointment of counsel;
  - the magistrate asking whether accused wants to request appointment of counsel;
  - and whether the person requested court appointed counsel.<sup>29</sup>

**REQUIREMENT NOT SATISFIED:** Spanish language forms do not contain a space to mark a request for counsel.

- If authorized to appoint counsel, the magistrate must do so within one working day after receipt of request for counsel in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>30</sup>

**NOT APPLICABLE:** The indigent defense plan does not authorize the magistrate to appoint counsel.

- If not authorized to appoint counsel, the magistrate must transmit or cause to be transmitted to the appointing authority an accused's request for counsel within 24 hours of the request being made.<sup>31</sup>

**REQUIREMENT NOT SATISFIED:** Financial paperwork was not promptly transmitted to the appointing authority when it was not completed at the time of the Article 15.17 hearing.

---

<sup>25</sup> TEX. CODE CRIM. PROC. art. 14.06(a).

<sup>26</sup> TEX. CODE CRIM. PROC. art. 17.033.

<sup>27</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>28</sup> *Id.*

<sup>29</sup> TEX. CODE CRIM. PROC. art. 15.17(e).

<sup>30</sup> *See, e.g.*, TEX. CODE CRIM. PROC. art. 15.17(a) (requiring magistrate to appoint counsel according to the timeframes set in TEX. CODE CRIM. PROC. art. 1.051); TEX. CODE CRIM. PROC. art. 1.051(c) (spelling out timeframe for appointment of counsel by county population size).

<sup>31</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

**REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS  
DIRECTED BY THE INDIGENT DEFENSE PLAN.**

- ☒ Provide detailed procedures used to determine whether a defendant is indigent.<sup>32</sup>
- ☒ State the financial standard(s) to determine whether a defendant is indigent.<sup>33</sup>
- ☒ List factors the court will consider when determining whether a defendant is indigent.<sup>34</sup>

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.**

- ☐ Establish objective qualification standards for attorneys to be on an appointment list.<sup>35</sup>
  - Standards must require attorneys to complete at least six hours of continuing legal education pertaining to criminal / juvenile law during each 12-month reporting period or be currently certified in criminal law by the Texas Board of Legal Specialization.<sup>36</sup>
  - Standards must require attorneys to submit by October 15 each year the percentage of the attorney's practice time dedicated to indigent defense based on criminal and juvenile appointments accepted in this county. The report must be made on a form prescribed by the Texas Indigent Defense Commission for the prior 12 months that begins on October 1 and ends on September 30.<sup>37</sup>

**REQUIREMENT NOT SATISFIED:** The County does not maintain proof of CLE compliance by attorneys on the appointment lists.

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (JUVENILES).**

- ☐ Unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.<sup>38</sup>

**REQUIREMENT NOT SATISFIED:** The percent of timely appointments did not meet TIDC's 90% threshold for presuming a jurisdiction's appointment system to be timely.

- ☐ If the child was not detained, an attorney must be appointed on or before the fifth working day after the date the petition for adjudication, motion to modify, or discretionary transfer hearing was served on the child.<sup>39</sup>

**REQUIREMENT NOT SATISFIED:** The percent of timely appointments did not meet TIDC's 90% threshold for presuming a jurisdiction's appointment system to be timely.

---

<sup>32</sup> TEX. CODE CRIM. PROC. art. 26.04(l)–(r).

<sup>33</sup> TEX. CODE CRIM. PROC. art. 26.04(l).

<sup>34</sup> TEX. CODE CRIM. PROC. art. 26.04(m).

<sup>35</sup> TEX. CODE CRIM. PROC. art. 26.04(d).

<sup>36</sup> 1 TEX. ADMIN. CODE § 174.1–.4.

<sup>37</sup> TEX. CODE CRIM. PROC. art. 26.04(j)(4).

<sup>38</sup> Tex. Fam. Code § 54.01(b-1). Tex. Fam. Code § 51.10(c).

<sup>39</sup> Tex. Fam. Code § 51.101(d).

#### **REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (ADULTS).**

- Incarcerated persons: After receipt of a request for counsel, counsel must be appointed within one working day in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>40</sup>
- Persons out of custody: Counsel must be appointed at the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.<sup>41</sup>

**REQUIREMENT NOT SATISFIED:** The percent of timely appointments in felony cases did not meet TIDC's 90% threshold for presuming a jurisdiction's appointment system to be timely.

- All unrepresented defendants must be advised of the right to counsel and the procedures for obtaining counsel.<sup>42</sup>

#### **REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS.**

- Rotational method: The court must appoint an attorney from among the next five names on the appointment list in the order in which the attorneys' names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order.<sup>43</sup>

**NOT APPLICABLE:** Kendall County uses an alternative system of appointment.

- Public Defender: The system must meet the requirements set out in Article 26.044 of the Code of Criminal Procedure. The appointment process must be listed in the indigent defense plan.<sup>44</sup>

**NOT APPLICABLE:** Kendall County does not have a public defender.

- Alternative appointment method:<sup>45</sup>
  - The local processes must be established by a vote of two-thirds of the judges.
  - The plan must be approved by the presiding judge of the administrative judicial region.
  - The courts must allocate appointments reasonably and impartially among qualified attorneys.

---

<sup>40</sup> TEX. CODE CRIM. PROC. art. 1.051(c).

<sup>41</sup> TEX. CODE CRIM. PROC. art. 1.051(j); *see also Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 – 13 (2008) (holding that “a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”).

<sup>42</sup> TEX. CODE CRIM. PROC. art. 1.051(f-2).

<sup>43</sup> TEX. CODE CRIM. PROC. art. 26.04(a).

<sup>44</sup> TEX. CODE CRIM. PROC. art. 26.044.

<sup>45</sup> TEX. CODE CRIM. PROC. art. 26.04(g)–(h).